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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 632

DETROIT TRUST COMPANY (formerly Security Trust Company), a Michigan corporation, Executor of the Will of Cornelia O. Curtis, deceased,

Petitioner,

vs.

FRED L. WOODWORTH, Collector of Internal Revenue for the First District of Michigan,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

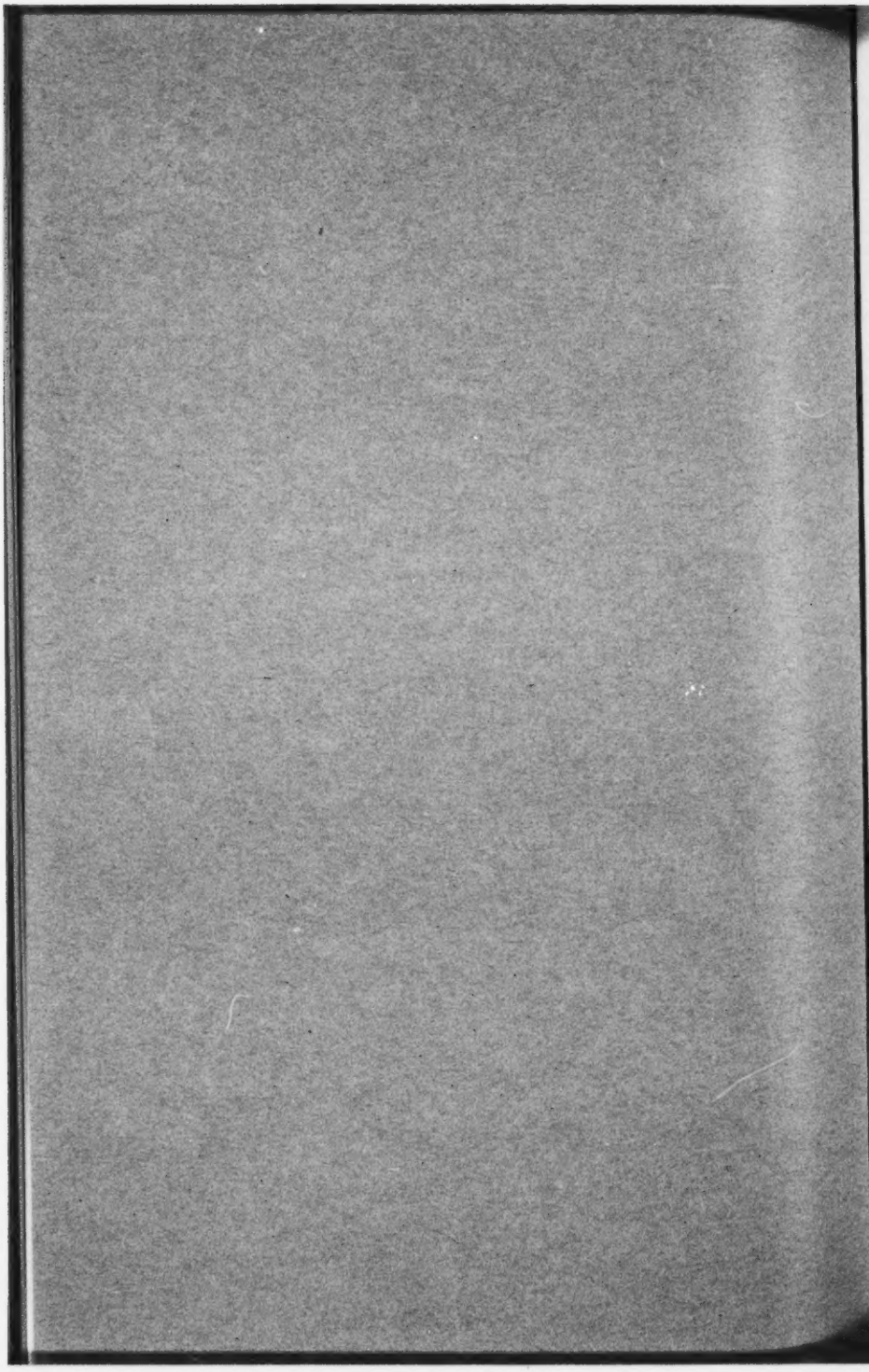
and

BRIEF IN SUPPORT THEREOF

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Petitioner,

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FRED L. WOODWORTH, Collector of Internal Revenue for the First District of Michigan,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

DETROIT TRUST COMPANY (formerly Security Trust Company), a Michigan corporation, Executor of the Will of Cornelia O. Curtis, deceased, by its counsel, prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Sixth Circuit, entered on September 16, 1940, amending the mandate to order a new trial and otherwise denying the petitioner's motion to modify and clarify the mandate and to review the order of said court entered on October 16, 1940 denying the petitioner's motion to reconsider said order.

SUMMARY STATEMENT OF MATTERS INVOLVED

The petitioner instituted this suit in the District Court of the United States for the Eastern District of Michigan, on August 2, 1929. It was at issue shortly thereafter but was not called for trial until February 17, 1938, nearly nine years later.

The declaration, including the claims for refund, exhibits "A" and "B" attached thereto, states a cause of action for the recovery of the sum of $664,791.26, paid in two installments ($183,410.44 on September 5, 1924 and $481,380.82 on May 15, 1928) to the respondent as a deficiency income tax assessment for the year 1917, and interest accrued thereon, together with interest on such sum from the dates of payment thereof to the date of recovery thereof. (Declaration R. 5-30.) (Findings of Fact R. 48, 52.)

The respondent, Fred L. Woodworth, Collector of Internal Revenue for the First District of Michigan, appeared by the United States attorney, pleaded the general issue and gave notice of three affirmative defenses, the second and third of which were in the nature of pleas in confession and avoidance, as follows:

> Second Defense: The plaintiff voluntarily entered into a valid and binding contract, to-wit, a bond whereby the plaintiff elected to limits its right to contest the assessment to the manner set forth therein, and having paid the balance of the assessment in accordance with the terms of the bond, the plaintiff was barred from further contesting the assessment (Amendment to Defendant's Pleas, R. 44-45, Opinion of the Court, 110 Fed. 2d, 829).
>
> Third Defense: The plaintiff's action was barred by the Statute of Limitations. (Amendment to Defendant's Pleas, R. 45-49.)

By stipulation of counsel, made orally in open court, a jury was waived and the trial was limited to the issues

raised by the defendant's second and third affirmative defenses as set forth in the Amendment to Defendant's Pleas (Judgment R. 54, Stipulation R. 88).

The amount of damages is liquidated except for the computation of interest, the damages recoverable being the amount of $664,791.26 paid by the petitioner to the respondent on the illegal deficiency Income Tax assessment against petitioner's decedent for the year 1917.

The District Court filed special findings of fact, sustained the respondent's second and third affirmative defenses and entered judgment dismissing petitioner's action.

No bill of exceptions was filed because the facts as found by the court were not in dispute. Therefore the only issue before the Circuit Court of Appeals was the issue of the sufficiency in law of the special findings of fact to sustain the judgment of dismissal. (Opinion R. 79.)

The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause "for further proceedings in accordance with the opinion of this court." Neither the opinion nor the mandate, issued in pursuance thereof, specified or even indicated what further proceedings should be had. In this respect the opinion and mandate were ambiguous. (Opinion R. 76-81).

The petitioner filed a motion to modify and clarify the mandate to direct the entry of judgment for the petitioner on the grounds that a jury had been waived, the court had filed special findings of fact and the damages were a liquidated sum; therefore the court, on reversing the judgment for the defendant, should have directed the entry of judgment for the plaintiff. (R. 83-91). Respondent did not answer or otherwise appear in opposition to this motion.

Instead of granting the motion as prayed and directing

the entry of judgment for the petitioner, the Circuit Court of Appeals ordered a new trial. (R. 93).

Petitioner filed a motion to reconsider the court's order which was denied even though the respondent likewise did not answer or otherwise appear in opposition to this motion.

JURISDICTION

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A. Sec. 347).

The orders of the Circuit Court of Appeals sought to be reviewed are the Order Amending the Mandate, entered September 16, 1940 (R. 93) and the Order denying Motion to Reconsider Order Amending Mandate, entered October 16, 1940. (R. 95). This petition for a writ of certiorari was filed on or before December 16, 1940.

At the time the petitioner filed its Motion to Modify and Clarify the Mandate, June 24, 1940, the time had already expired in which to petition for a writ of certiorari to review the decision of the court below on the merits of the case, filed March 14, 1940. But the court below had jurisdiction to recall, modify and clarify its mandate at any time during the term of court at which the judgment of reversal was entered.

Twin Falls Salmon River Land & Water Co. vs. Caldwell, 266 U. S. 85, 69 Law Ed. 178.

The petitioner's motion to modify and clarify the mandate was the proper method of invoking this jurisdiction.

Individual Drinking Cup Co. vs. Public Service Cup Co., 262 Fed. 410;

Epstein vs. Goldstein, 110 Fed. 2d, 747.

The court below did exercise this jurisdiction when on September 16, 1940 it entered an order amending the mandate to order a new trial. (R. 93). It further exercised this jurisdiction when it entertained, on October 16, 1940, and denied but did not dismiss petitioner's motion to reconsider said order amending the mandate. (R. 95).

This court has jurisdiction to issue a writ of certiorari to review an order granting a new trial.

Spiller vs. Atchison Topeka and Santa Fe Ry. Co., 253 U. S. 117, 64 Law Ed. 810.

QUESTION PRESENTED

Upon reversing a judgment for the defendant, should not the Circuit Court of Appeals, as a matter of law, direct the entry of judgment for the plaintiff, instead of ordering a new trial, in a case where a jury has been waived and the case tried by the court and where the court has filed special findings of fact, which are not in dispute since no bill of exceptions was filed; and, where the damages are a liquidated sum?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In ordering a new trial, instead of directing the entry of judgment for the petitioner, the Circuit Court of Appeals has decided an important question of Federal Procedure, which has occurred on several occasions in the past and is likely to occur more or less frequently in the future, in conflict with the decisions of this court in *Fort Scott vs. Hickman*, 112 U. S. 150, 28 Law Ed. 636; *Allen vs. St. Louis National Bank*, 120 U. S. 20, 30 Law Ed. 573; *Cleveland Rolling Mill Co. vs. Rhodes*, 121 U. S. 255, 30 Law Ed.

920; *Forged Steel Wheel Co. vs. Lewellyn,* 251 U. S. 511 and in *Retzer vs. Wood,* 109 U. S. 185.

Said decision is also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Oliver vs. Mt. Union Tanning and Extract Co.,* 264 Fed. 601 and in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Rathbone vs. Board of Commissioners of Kiowa County, Kansas,* 83 Fed. 125.

In ordering a new trial on its own motion and contrary to the motion filed by the petitioner, which motion was not opposed by the respondent, thereby subjecting the petitioner to the delays and expense and to the hazards of a second trial, more than eleven years after the case was instituted, when the only defenses the respondent considered worthwhile or necessary to litigate were based upon the statute of limitations and upon the terms of a bond given to secure the payment of the tax in question, which defenses were or should have been fully litigated upon the first trial, and in giving the respondent a second opportunity to produce other or additional evidence to sustain his defenses, the Circuit Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

We respectfully submit that a writ of certiorari should be granted.

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Of Counsel.





BRIEF IN SUPPORT OF THE FOREGOING PETITION

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit, on the merits of the case, filed March 14, 1940, is officially reported in 110 Fed. 2d at page 829. It is found on pages 76 to 81 of the Record. In this opinion the Court held that the judgment of the District Court, sustaining the respondent's affirmative defenses and dismissing petitioner's action, should be reversed. This decision has become final and is not here sought to be reviewed.

The Circuit Court did not file an opinion in connection with its decision on either of the petitioner's motions or in connection with either of the orders now sought to be reviewed.

The District Court did not file an opinion but did file findings of fact and conclusions of law (R. 47-54).

JURISDICTION

For a statement of the jurisdiction of this court see pages 4 and 5 of the foregoing petition.

STATEMENT OF THE CASE AND THE QUESTION INVOLVED

For a statement of the case and of the question involved see pages 2 to 5 of the foregoing petition.

ARGUMENT

PROOFS OF THE MATTERS WELL PLEADED IN THE DECLARATION WERE WAIVED BY THE STIPULATION OF COUNSEL

The stipulation to limit the issues in this case did not appear verbatim in the record in the Circuit Court of Appeals because it was made orally in open court and no bill of exceptions was filed. However, it is recited in the judgment which was prepared by respondent's counsel and presented by them to the court for signature.

We here quote the pertinent part of the judgment:

> "Now, on this 17th day of February, 1938, the above entitled cause came on for hearing pursuant to an agreement that the case be submitted to the court, without a jury, for its decision upon a trial limited to the issues raised by defendant's affirmative defenses to plaintiff's declaration as set forth in the amendment to the defendant's pleas filed herein on February 17, 1938."

We quote the stenographer's transcript of the agreement, which we quoted in our motion to modify and clarify the mandate and which stood unchallenged by the respondent in the Circuit Court of Appeals (R. 88). It confirms the stipulation as recited in the judgment.

> "Mr. Smith (Assistant District Attorney): Your Honor, before we proceed I think I would like to make a statement on the record as to the conference in Your Honor's chambers the other day. At that time we were before Your Honor on a petition upon request of the attorney for the plaintiff. At that time it was stated the plaintiff would insist upon their right to a trial by jury and it was thought the case would last approximately six days or a week. At that time we stated to Your Honor that we have

a defense in the nature of a plea at bar that would take only a short time to present and so dispose of the entire case, and that is irrespective of what showing plaintiff might make on the merits. At that time, Your Honor said you would hear us today on that motion, and I believe defendants stated they did not want to be in court a week on a jury trial, if it could be disposed of in this way, and that the defense is upon a bond. That is a correct statement, is it not, for the record, as to how we happen to be here at this time?

Mr. McCauley (Counsel for Plaintiff): I believe so."

This stipulation to limit the issues is open to but one reasonable interpretation. That interpretation is that all issues raised by the pleadings, other than those raised by the amended affirmative defenses, were eliminated and the defendant waived proof of the material allegations of the plaintiff's declaration.

The respondent likewise did not challenge our interpretation of the stipulation in the Circuit Court of Appeals.

The decided cases, construing stipulations to limit the issues (as distinguished from stipulations to eliminate a single issue) hold that proof on all other issues is thereby waived.

See: *Connell Bros. vs. Diederichsen Co.*, 213 Fed. 737;

Fire Association of Philadelphia vs. Crawford, 54 S. W. 2d 181;

Esch vs. Foster, 168 So. 229; 133 Fla. 905.

In *Connell Bros. vs. Diederichsen Co.*, the Circuit Court of Appeals for the Ninth Circuit held that though the defendant denied the plaintiff's allegations, that it was a firm or company, proof thereof was waived by a stipulation that the trial should be had only on the issues of breach of contract and damages.

In *Fire Association vs. Crawford,* the court held that an agreement, that the only issue was the amount of damages recoverable under a fire insurance policy, constituted an acknowledgment that all other matters relating to recovery sufficiently appeared.

The Supreme Court of Florida, in *Esch vs. Foster,* held that a stipulation which prescribes the issues on which the case is to be tried, unlike a stipulation which merely eliminates a single issue, amounts to a binding waiver and elimination of all issues not included.

THE STIPULATION IS A BINDING AGREEMENT WHICH WILL SUPPORT THE ENTRY OF JUDGMENT FOR THE PLAINTIFF

The stipulation was affirmatively assented to by both parties and therefore has the same binding effect and potency as an order of the court, agreed to by the parties, to the same purpose.

Brookings State Bank vs. Federal Reserve Bank of San Francisco, 291 Fed. 659;

United States vs. Davison, 1 Fed. 2d 465, affirmed 9 Fed. 2d 1022.

Stipulations made in open court, unlike stipulations between attorneys not made in open court, need not be in writing signed by them.

Lewis vs. Wilson, 151 U. S. 551; 38 Law Ed. 267.

It is well settled law that counsel may stipulate to limit the issues in a case.

Tucker vs. Alexander, 275 U. S. 228; 72 Law Ed. 253;

Schley vs. Pullman Car Co., 120 U. S. 575; 30 Law Ed. 789;

Connell Bros. Co. vs. H. Diederichsen Co., 213 Fed. 737;

Starkpole vs. Northern Pacific R. R. Co., 121 Fed. 389;

Fire Ass'n. of Philadelphia vs. Crawford, 54 S. W. 2d, 181;

Esch vs. Foster, 168 So. 229; 123 Fla. 905.

THE DISTRICT ATTORNEY HAD AUTHORITY TO ENTER INTO THE STIPULATION MADE IN THIS CASE

The statute authorizes the District Attorney to appear for and defend suits against the Collector of Internal Revenue (Revised Statutes Sec. 771, 28 U. S. C. A. 485). It does not limit his power or direct the manner of performing his duty in cases against Internal Revenue Officers.

See: *Sage vs. U. S.*, 250 U. S. 33; 63 Law Ed. 828;

Atkins vs. Bender, 18 Fed. 2d 357;

Fletcher vs. Booth, 101 Fed. 2d 676;

Castell vs. U. S., 98 Fed. 2d 88.

THERE IS NO NECESSITY FOR A NEW TRIAL OR PARTIAL NEW TRIAL

The District Court made special findings of fact which completely covered all issues except those withdrawn by the stipulation of counsel limiting the issues and except the amount of damages. The correctness of these findings was not contested upon appeal. The amount of damages is liquidated, the entire deficiency income tax assessment

being illegal and void. Therefore, there is no necessity for a new trial, in whole or in part, because there is no need either for further evidence to be submitted or for further facts to be found.

If respondent's counsel did not see fit on the trial to introduce all of the available evidence in support of his theory, he should not be given a second opportunity to bolster his case when the facts as proved by him and as found specially by the court are undisputed.

Nevertheless the Circuit Court amended the mandate to order a new trial.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

The question of procedure raised in the Circuit Court of Appeals by the motion to modify and clarify the mandate, has been before this court on at least five occasions.

In the case of *Fort Scott vs. Hickman,* 112 U. S. 150, 28 Law Ed. 636, a jury was waived and the trial court made special findings of fact. The Supreme Court reversed the judgment for the plaintiff and remanded the case for the entry of judgment, saying:

> "In cases like the present one the proper practice is to direct a judgment for the defendant instead of awarding a new trial."

In *Allen vs. St. Louis National Bank,* 120 U. S. 20, 30 Law Ed. 573, this court on reversing a judgment for the plaintiff held:

> "all the facts of the case being ascertained by the special finding of the court below, as they would be by a special verdict of a jury, there is no reason for awarding a new trial, but there must be a general judgment for the defendants."

To the same effect is *Cleveland Rolling Mill Co. vs. Rhodes,* 121 U. S. 255, 30 Law Ed. 920.

In the case of *Forged Steel Wheel Co. vs. Lewellyn,* 251 U. S. 511, 64 Law Ed. 380, this court refused a request to remand the case for a new trial, saying:

> "Objection is made to the action of the Circuit Court of Appeals in simply reversing the judgment of the District Court and not remanding the case for a new trial. There was no objection made to that action and no request for a remand of the case; and besides there was nothing to retry. The case involves only propositions of law."

Likewise the instant case involves only propositions of law. The petitioner offered no evidence on the trial. The respondent offered evidence to sustain his affirmative defenses and the court found the facts as prepared by his counsel. On the appeal, no bill of exceptions having been included in the record, the only question before the Circuit Court of Appeals was the question of law of whether or not the facts as found supported the judgment of dismissal. The answer to that question in turn depended upon the proper construction of the bond in the light of the circumstances under which it was given. The Circuit Court of Appeals, having only to decide questions of law, was in a position to and should have directed the entry of judgment.

The case of *Retzer vs. Wood,* 109 U. S. 185, 27 Law Ed. 960 is directly in point. The action is similar to the instant case in that the action was to recover Internal Revenue taxes illegally exacted. The case was tried by the court without a jury; the trial court made special findings of fact and held that the taxes were illegally exacted but that the action was barred by the Statute of Limitations. The Supreme Court reversed the judgment because the Statute of Limitations had not been pleaded. The defendant asked that "if the judgment be reversed, the case be remanded

so the Statute of Limitations may be pleaded." The Supreme Court directed the entry of judgment for the plaintiff, saying:

> "The special findings of fact were equivalent to a special verdict, and the question thereon was whether they required a judgment for the plaintiff or the defendant."

The only difference in the case at bar and *Retzer vs. Wood* is that in the instant case proof of the illegal exaction was waived by the stipulation of counsel, made in open court, limiting the issues to those raised by the defendant's affirmative defenses as set forth in the amendment to the defendant's pleas, whereas in the Retzer case proofs were submitted and the court found in its special findings that the tax was illegally exacted. The difference is not material, because by limiting the issues, the parties agreed that the material facts, well pleaded, relative to the illegal tax, sufficiently appeared.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEALS FOR THE THIRD AND EIGHTH CIRCUITS

The Circuit Court of Appeals for the Third Circuit in *Oliver vs. Mt. Union Tanning & Extract Co.*, 264 Fed. 601, 608, reversed a judgment for the plaintiff in an insufficient amount and directed the entry of judgment for the plaintiff in the larger amount claimed, saying:

> "We have no doubt that we have the power to direct such a judgment to be entered as the pleadings and the special findings of fact of the court below require."

The Circuit Court of Appeals for the Eighth Circuit in *Rathbone vs. Board of Commissioners of Kiowa County, Kansas,* 83 Fed. 125, 132, reversed a judgment for the defendant and ordered a new trial in a case tried before the court without a jury on an agreed statement of facts. The plaintiff filed a motion to modify the judgment and the mandate to direct the entry of judgment for the plaintiff. The court granted this motion, saying:

> "* * * The motion is based upon the ground that as a jury was duly waived, and the case was tried upon an agreed statement of facts, and the damages recoverable are a liquidated sum, there is no occasion for a second trial. We are satisfied that the motion is well founded on the following cases. * * * Therefore the judgment will be modified as prayed and the Circuit Court will be directed to enter judgment against the defendant county in the sum of $3,831.60 with interest thereon at the rate of 6 per cent per annum from July 1, 1894, to the date of entry."

The rulings in both of these cases are the direct antithesis to the decisions of the Circuit Court of Appeals in this case.

THE SUPREME COURT SHOULD EXERCISE ITS POWER OF SUPERVISION IN THIS CASE

Petitioner instituted this action in the District Court on August 2, 1929 and it was at issue shortly thereafter. Through no fault of the petitioner or its counsel the case was not called for trial until February 17, 1938, approximately nine years later. An additional two years time expired before the case was decided upon appeal.

Petitioner intended to insist upon its right to a jury trial. Respondent's counsel apparently felt that the only questions necessary for the court to consider were the running

of the statute of limitations and the terms of the bond executed by the taxpayer to secure the payment of the tax and obtain an extension of time for payment, which constituted their second and third affirmative defenses. They said that the case could be disposed of on the special defenses which would take only a short time to present "and that is irrespective of what showing plaintiff might make on the merits." Counsel did not wish to be in court a week's time if the only defenses to be relied upon were to be defendant's second and third special defenses. The parties by their counsel stipulated in open court to waive a jury and limit the issues to those raised by the second and third affirmative defenses. The case proceeded to trial on that basis.

After the Circuit Court of Appeals reversed the judgment for the defendant, petitioner filed its motion to modify the mandate to direct the entry of judgment for the plaintiff. This motion was not opposed by respondent's counsel.

The Circuit Court of Appeals in amending the mandate to order a new trial has acted contrary to precedent. Its order is ambiguous in that it does not designate the scope of the new trial. In deciding our motion to reconsider, it refused to answer the question as to whether it is to be a first trial on the merits or a second trial on the affirmative defenses, or both.

In ordering a new trial, it has further subjected the petitioner to unnecessary expense and delay in obtaining justice and to the hazards incident to litigating its claim, after the lapse of such a long period of time. In the meantime, many of the material witnesses have died or their whereabouts have become unknown and important records not in the possession of Petitioner or its counsel have become lost or destroyed.

In ordering a new trial the Circuit Court has also given the respondent a second opportunity to prove his claims

with respect to his affirmative defenses, which were or should have been fully litigated on the first trial. If the new trial is to be on the merits, it also gives the respondent another opportunity to sustain defenses which his counsel thought unnecessary or not worthwhile advancing on the first trial.

Whether or not the stipulation limiting the issues on the first trial would govern on a second trial cannot be ascertained with certainty.

The position in which the Circuit Court of Appeals has placed the petitioner by ordering a new trial contrary to petitioner's request and without any request from the respondent, and contrary to the authority of the adjudicated cases, seems to us to call for an exercise of the supervisory powers of this court.

CONCLUSION

For the reasons above stated and on the authorities above cited, we respectfully submit that a writ of certiorari should issue as prayed.

CHARLES F. DELBRIDGE,
Attorney for the Petitioner.

FRANCIS W. MCCAULEY,
Of Counsel.



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CHARLES ELMORE CROP
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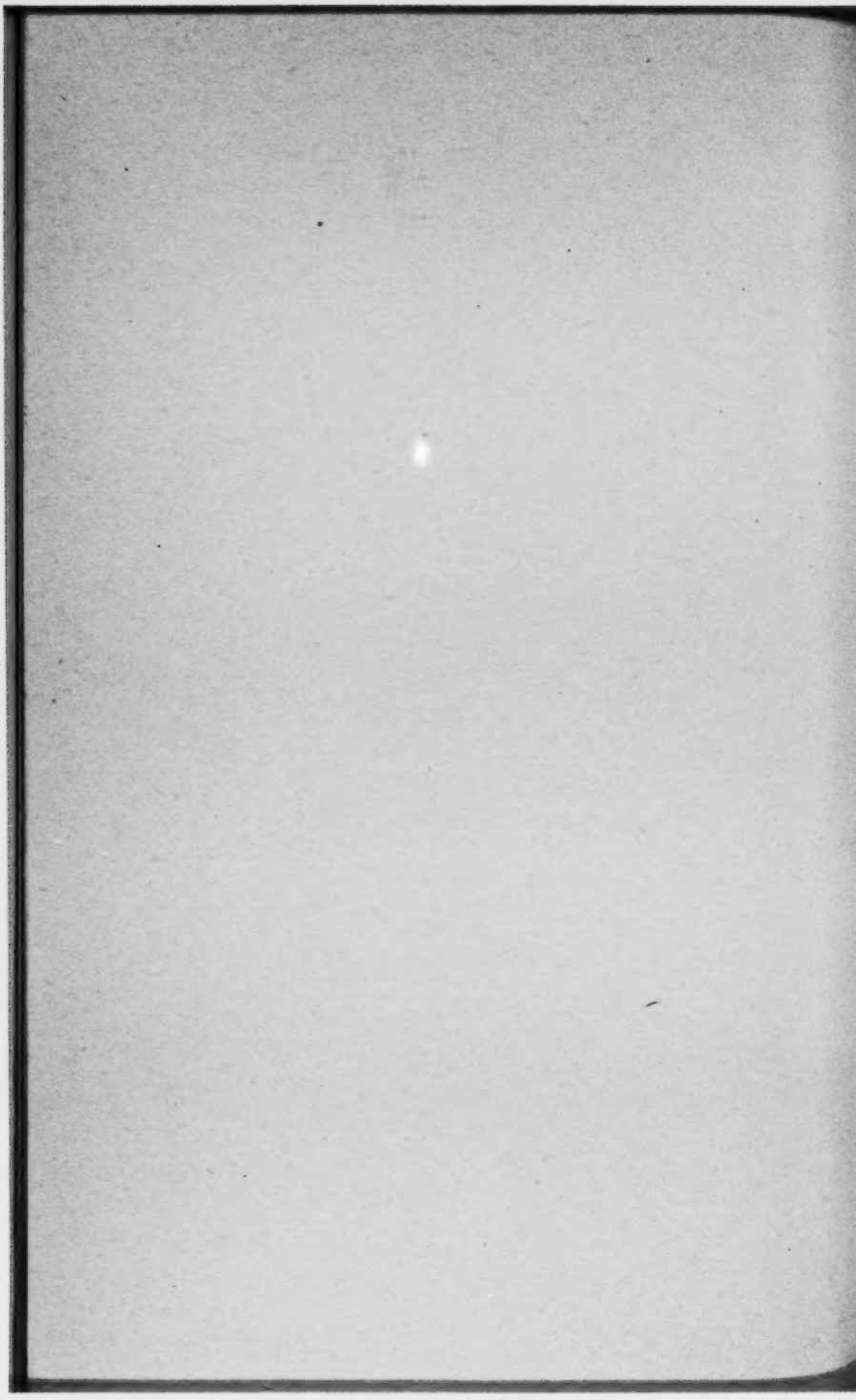
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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THE INLAND PRESS, DETROIT, MICHIGAN



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REPLY BRIEF FOR PETITIONER

No question is presented as to the content or construction of the oral agreement, made in open court, limiting the issues in this case. Nor was any such question raised in the Circuit Court of Appeals.

Any question as to the content or construction of such agreement is foreclosed by the record, which is clear and unambiguous.

The judgment (R. 54), states in the language of respondent's counsel, that the "cause came on for hearing pursuant to an agreement that the case be submitted to the court without a jury for its decision upon a trial limited

to the issues raised by the defendant's affirmative defenses as set forth in the amendment to the defendant's pleas."

But, respondent's counsel, now, in the Supreme Court, for the first time, attempt to vary the terms of the stipulation as stated in the judgment, prepared by them, and seek to go beyond the record to claim an oral stipulation not made in open court but in chambers calling for a trial of all the issues, piecemeal and without a jury.

The plaintiff had waited nine years for its case to be called for trial. It was insisting upon its right to a jury trial. But the respondent now claims, in effect, that petitioner waived a trial by jury and agreed to permit of a piecemeal trial in order to save the time of respondent's counsel in court. The record is barren of any support for such a claim.

If, however, the court should feel constrained to look, beyond the record, to the statement made by the District Attorney in open court (R. 88) and there agreed to by petitioner's counsel then we respectfully submit that such statement should not be given a strained construction so as to call for a trial, piecemeal and without a jury, after this case already had been awaiting nine years for a trial by a jury.

CONCLUSION

When the stipulation is given the plain meaning of the language employed, then the only question presented by the petition for certiorari, is, should the Circuit Court of Appeals have directed the entry of judgment for the plaintiff instead of ordering a new trial.

We submit that a writ of certiorari should issue for the reasons stated in the petition.

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Of Counsel.

January, 1941.

No. 632

In the Supreme Court of the United States

OCTOBER TERM, 1940

DETROIT TRUST COMPANY (FORMERLY STATE TRUST COMPANY), A MICHIGAN CORPORATION, EXECUTOR OF THE WILL OF CORNELIA O. CURTIS, DECEASED, PETITIONER

v.

FRED L. WOOLVERTON, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The District Court rendered no opinion but entered judgment upon special findings of fact and conclusions of law (R. 47–55). The opinion of the Circuit Court of Appeals (R. 76) is reported in 110 F. (2d) 829. The Circuit Court of Appeals rendered no opinion in connection with its orders of September 16, and October 16, 1940 (R. 93, 95), now sought to be reviewed.

JURISDICTION

The orders of the Circuit Court of Appeals sought to be reviewed were entered September 16, and October 16, 1940. (R. 93, 95.) The petition for a writ of certiorari was filed December 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The only question presented is as to the content or proper interpretation of an oral pre-trial agreement between counsel.

STATEMENT

This suit was brought by petitioner's corporate predecessor to recover federal income taxes assessed against and paid by it as executor of the will of Cornelia O. Curtis, deceased, for the calendar year 1917. The declaration, filed August 2, 1929, alleged various facts and conclusions purporting to state a cause of action for the recovery of the taxes (R. 5–30). The Collector entered a "Plea of Defendant and Notice of Special Defenses"; therein he demanded a trial of the matters set forth in the declaration and under the plea of general issue interposed and set forth three special defenses (R. 33–40, 43–46). The second of these defenses was that prior to the payment of a portion of the taxes the taxpayer had given a bond, and that the payments thereafter

made were made in satisfaction of the bond and not as payments of taxes (R. 33–35). The third defense was that the action was barred by the statute of limitations (R. 45–46).

Thereafter, by oral agreement of counsel at a conference in the judge's chambers, a jury was waived and a trial was had limited to the issues raised by the Collector's affirmative defenses (R. 54). Following this trial the District Court made findings of fact and conclusions of law sustaining the second and third special defenses (R. 47–54) and entered judgment that the action be dismissed (R. 54–55).

Upon petitioner's appeal, the Circuit Court of Appeals for the Sixth Circuit reversed the judgment of the District Court and remanded the case "for further proceedings in accordance with the opinion of this court" (R. 75). In rejecting the defense based on the bond, the court said: "the Government is in no way harmed by now permitting the obligor to have its day in court to contest the legality of the assessment" (R. 80).

Thereafter petitioner filed in the Circuit Court of Appeals a motion to modify and clarify the mandate of that court, so as to direct the District Court to enter judgment for the plaintiff in the amount sued for (R. 83–85). In its brief in support of this motion petitioner contended that by the oral agreement counsel for the Collector waived proof of the illegal exaction and elim-

inated all issues other than the affirmative defenses (R. 87). Upon consideration of this motion the Circuit Court of Appeals amended its mandate so as expressly to provide for a new trial, and denied the motion in all other respects (R. 75, 93). A further motion of petitioner to reconsider the order amending the mandate was denied on October 16, 1940 (R. 95).

ARGUMENT

Petitioner seeks, in essence, to obtain judgment for the recovery of taxes (in amount $664,791.26 plus interest) without a trial upon the merits: petitioner's contention is that counsel for the Collector by an oral (and unreported) agreement waived trial upon the merits. This contention, peculiar as it is to the case, does not warrant review by this Court.

Further, petitioner's claim is improbable on its face and the record is bare of any support for it. The affirmative defenses were interposed "under the plea of general issue" (R. 33). We contend that all parties, and the court, understood that while the separate defenses were to be adjudicated first, because if they were upheld there would be no necessity for a lengthy trial upon the merits, that if they were rejected the case would then proceed to trial upon the merits. The agreement of counsel was not reduced to writing or reported, and the opening remarks of Assistant District Attorney Smith at the trial, quoted in

the petition for certiorari (pp. 8–9), do not in fact reflect the entire agreement and understanding. But regardless of that, the fair import of his remarks is that the hearing was only a preliminary one, agreed to for the reason that if the special defenses were sustained a lengthy trial on the merits, which would otherwise be necessary, would be avoided. The plain implication is that if the special defenses were not sustained the case would proceed to a regular trial upon the merits.

Those of the cases cited by petitioner which are in point on any supposition are so only if petitioner's version of the oral pre-trial agreement be accepted.

CONCLUSION

The question presented involves only the content or construction of a particular oral pre-trial agreement; hence the petition should be denied.

Respectfully submitted.

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